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Nos. 87-1487, 87-1506, 87-1510 and 87-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
Respondents.

ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
Petitioner,

v.

CENTURY COMMUNICATIONS CORP., *et al.*,
Respondents.

CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
AND PUBLIC BROADCASTING SERVICE,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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CONSOLIDATED OPPOSITION OF RESPONDENT RICHARD S. LEGHORN TO THE PETITIONS FOR A WRIT OF CERTIORARI

(Attorneys Listed on Inside Cover)

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May 9, 1988

QUESTIONS PRESENTED

The Office of Communication of the United Church of Christ ("UCC"); the Corporation for Public Broadcasting, *et al.* ("CPB"); the National Association of Broadcasters ("NAB"); and the Association of Independent Television Stations, Inc. ("INTV") have each filed a petition for a writ of *certiorari*[1] seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Century Communications Corp., et al. v. Federal Communications Commission, et al.*, 835 F.2d 292 (D.C. Cir. 1987).[2] The questions raised by the petitioners may be distilled to the following:

> Whether the Court of Appeals properly applied the standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) in holding temporary must-carry rules to be unconstitutional restrictions on free speech, where the FCC was unable to "adduce either empirical support or at least sound reasoning on behalf of"[3] the rules.

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[1] This opposition is being filed as a consolidated opposition to the four petitions.

[2] The opinion below is reproduced in Petitioners' Appendix ("P.A.") at pp. 1a-28a.

[3] P.A. at 28a.

PROCEDURAL STATEMENT

Richard S. Leghorn, formerly a cable operator and now an investor in cable enterprises, submitted comments to the FCC on the regulations at issue in these proceedings and was a petitioner in the consolidated proceedings before the Court of Appeals. Pursuant to Supreme Court Rule 34.2, Mr. Leghorn relies on the petitions of UCC, CPB, NAB and INTV for a list of the parties to the proceedings, the citations to the opinions and judgments delivered below, the jurisdictional statements, and the statement of statutory and constitutional provisions involved.

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STATEMENT OF THE CASE

1. The FCC Regulations.

In *Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom., National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986), the Court of Appeals held that the First Amendment rendered "must-carry" rules promulgated by the Federal Communications Commission ("FCC" or the "Commission") unconstitutional. Those earlier rules required cable operators to carry the signals of all local broadcast stations. The rules were thought necessary by the FCC to "assure that the advent of cable technology not undermine the financial viability of free, community-oriented television." 768 F.2d at 1440.

In addressing the constitutional challenge to the rules, the *Quincy* court found it unnecessary to decide the precise level of First Amendment protection enjoyed by cable operators; rather, it found that two reasons rendered the must-carry rules invalid even under the lenient standard established by *United States v. O'Brien*, 391 U.S. 367 (1968). 768 F.2d at 1454. First, the court held that the FCC failed to substantiate a threat to free local broadcasting in the absence of the must-carry rules. 768 F.2d at 1459. Second, the court held that the rules were a fatally overbroad response to the problem posited by the FCC because they indiscriminately protected every local broadcaster regardless of the quality of local service available in a community, the number of local outlets

carried by a cable operator, or the degree to which a cable operator posed a threat to local broadcasting. 768 F.2d at 1460-63.

After *Quincy*, the FCC initiated a rule-making proceeding to consider new must-carry rules. In November, 1986, the FCC promulgated new, temporary rules.

The feature which most distinguishes the temporary rules from the permanent must-carry rules invalidated in *Quincy* is the justification offered for their promulgation. In crafting the temporary rules, the Commission did not attempt to garner evidence in support of the need to protect local broadcasting. Rather, after reviewing changes in the cable industry over the past two decades, the Commission concluded that "it is no longer appropriate or desirable to treat cable as an auxiliary video distribution service and to protect local broadcast television service from competition with cable service." P.A. at 97a.

The FCC did, however, perceive a temporary need to impose limited must-carry rules "to maximize the availability of program choices by competing providers both off-the-air and on cable." *Id.* After reviewing one study showing a decrease in the installation and use of antennas, P.A. at 100a, the Commission concluded that consumers incorrectly believed that "their only means of access to off-the-air signals is through their cable service." P.A. at 99a. The Commission argued that temporary measures were necessary to correct this "misperception" before "economic forces can be relied upon to achieve maximum diversity in program choices for the public." *Id.*

There were three main features of the regulations adopted by the FCC.[1] First, the regulations required

[1] The FCC regulations are reproduced in Petitioners' Appendix at 177a-88a and are codified at 47 C.F.R. §§ 76.5, 76.53, 76.55, 76.56, 76.58, 76.60, 76.62, 76.64 and 76.66.

cable operators to offer to install "input-selector devices" in consumers' television sets. P.A. at 185a-87a. *See also* P.A. at 112a-14a. These devices—costing as little as $7.50—permit viewers to readily switch from cable to broadcast programming, thus ensuring access to the greatest number of program choices. Second, the regulations required cable operators to educate the public about the availability of switches and their use to obtain broadcast signals not available over cable. *Id.* Finally, the regulations contained must-carry rules, effective for the five year period the Commission thought necessary for consumers to become accustomed to input-selector devices. P.A. at 180a-82a. *See also* P.A. at 114a-25a.

The temporary must-carry rules were more limited in scope than the permanent rules invalidated by *Quincy*. The temporary rules applied only to a portion of a cable operator's channel capacity and not at all to some cable operators. *See* P.A. at 180a-82a. *See also* P.A. at 119a-22a. Moreover, not all local broadcasters would be entitled to the benefit of the rules. P.A. at 177a-82a. *See also* P.A. at 114a-22a. To be entitled to carriage, a station must have a minimum audience or must otherwise fall into a class favored by the Commission as, for example, public broadcasting stations. *Id.*

2. The Decision Below.

In the Court of Appeals Mr. Leghorn argued that the new rules should be invalidated because they were not and could not be justified as a "precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980). Mr. Leghorn also argued that the temporary rules failed the First Amendment test established by *United States v. O'Brien, supra.* Because the FCC's input-selector switch and consumer information rules are fully adequate to ensure access to off-the-air signals and correct any consumer misperception, Mr. Leghorn contended there is no need to intrude on cable

operators' First Amendment rights by continuing must-carry rules. Certainly, no such need was demonstrated in the record before the FCC.[2]

A unanimous panel of the Court of Appeals did not find it necessary to address the broad constitutional arguments principally urged by the other petitioners below. P.A. at 14a-15a. Instead, the Court devoted its narrowly drawn decision to an examination of whether the FCC met its burden of establishing that the temporary must-carry rules met the *O'Brien* standard. P.A. at 15a-28a. The Court held that the agency had again failed to offer empirical evidence or sound reasoning showing a threat to a governmental interest sufficient to justify even an incidental restriction on speech. P.A. at 28a. The Court also found that the rules were overbroad because the FCC had supplied no evidence that five years of continued must-carry rules were necessary even if the existence of a valid governmental interest was presumed. P.A. at 26a-28a.

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Narrow Ruling Does Not Conflict With Other Court Decisions And Raises No Questions Warranting Review.

The petitioners misconstrue what the FCC and the Court of Appeals actually decided in an attempt to create

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[2] In his initial comments filed with the FCC, Mr. Leghorn advanced the concept of relying on input-selector switches rather than must-carry rules as a means to achieve the FCC's objectives without intruding upon constitutionally protected rights. In particular, he argued that the FCC should require manufacturers to design and sell television receivers with built-in switching capability so that cable subscribers could simply switch to off-air reception if their cable system did not carry the signal of a desired local television station. While the FCC did not adopt the built-in switch aspect of his proposal, Mr. Leghorn did not appeal the Commission's failure to do so because he believed the FCC's input-selector switch rules, as modified on reconsideration, accomplished most of what he sought to achieve, were not intrusive on First Amendment rights and obviated the need for temporary must-carry rules.

a conflict among the authorities or important issues warranting review. The FCC's and the court's reasoning and conclusions were, however, clear. The FCC enacted temporary must-carry rules to further a governmental interest in diverse programming which the FCC believed was temporarily threatened by an alleged "consumer misperception" that cable would always carry all broadcast signals. P.A. at 96a-100a. The Court of Appeals held that, because neither empirical evidence nor sound reasoning justified the need or effectiveness of these new must-carry rules, they could not pass constitutional muster even under the more lenient *O'Brien* standard. P.A. at 28a.

Nonetheless, the NAB's lead argument addresses the standard of First Amendment protection to which cable is entitled and takes as its starting point *Quincy's* discussion of that issue. NAB Pet. at 12-13. But neither *Quincy* nor the court below purported to decide the "vexing question" of what "level of First Amendment protection [is] due a cable television operator." *Century Communications*, P.A. at 14a-15a; *Quincy*, 768 F.2d at 1454. Rather, both decisions held that the must-carry rules presented for review were unconstitutional under the *O'Brien* standard—the standard the FCC argued should be applicable. *Century Communications*, P.A. at 28a; *Quincy*, 768 F.2d at 1463. An "either-broadcasting-or-print-model dichotomy"— which the NAB invites the Court to examine as "suspect"—was precisely the "flavorful" analogy which the Court of Appeals declined to utilize in analyzing the constitutional question presented to it.[3] *Century Communications*, P.A. at 13a-15a.

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[3] At one point in its petition, the NAB seems to suggest that the must-carry rules implicate no First Amendment concerns at all because cable systems can safely be treated, at least in part, as passive common carriers for the carriage of broadcast signals. NAB Pet. at 14-15. This theory was rejected by the FCC below and by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968), on which petitioners substantially rely. *See*

Similarly, the petitioners ignore the rationale advanced by the FCC in support of its regulations. The petitioners seek to reinstate must-carry rules by conjuring some threat to local broadcasting if an operator's decision to carry a broadcast signal is dictated by the market rather than the FCC. UCC Pet. at 11-17; CPB Pet. at 22-25; NAB Pet. at 26-27; INTV Pet. at 26-28. But this rationale was never offered by the FCC as a justification for its temporary must-carry rules, and accordingly was never reviewed by the court below. Indeed, while the permanent must-carry rules examined and rejected in *Quincy* were defended for their alleged protection of local broadcasting, in these proceedings the FCC expressly disavowed reliance on such a rationale to justify its temporary must-carry rules. P.A. at 96a-97a. *See also* P.A. at 9a.

The FCC's abandonment of an earlier justification presents no issue warranting review. It does not, as the petitioners suggest, create a conflict with this Court's opinion in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). *See* UCC Pet. at 11; CPB Pet. at 25; NAB Pet. at 18; INTV Pet. at 13. In *Southwestern*, the Court emphasized that it was not ruling on the validity of specific FCC rules for cable television. 392 U.S. at 167. Instead, the Court merely upheld the general authority of the FCC to regulate cable, in part because the FCC had "reasonably concluded" that regulation of cable was necessary to advance the FCC's mandate to foster a system of local broadcasting. 392 U.S. at 173-74. *See*

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also FCC v. Midwest Video Corp., 440 U.S. 689, 708-09 (1979). Absent direct government intrusion via the must-carry rules, cable operators actively exercise editorial judgment in the choice and mix of broadcast stations they carry in conjunction with other cable programming sources. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-95 (1986). In any event, the Cable Communications Policy Act of 1984 firmly establishes that cable is not a common carrier. 47 U.S.C. § 541(c).

47 U.S.C. § 307(b). What the Court did not do was address the constitutionality of must-carry rules (or any other FCC regulation); suggest that the governmental interest in local broadcasting was a statutory command for must-carry rules; or hint that the FCC was not free to reevaluate the competing interests raised by must-carry rules in light of changed circumstances and evolving technology.[4]

The FCC's abandonment of its earlier rationale for must-carry rules also makes illusory any supposed conflict between the Court of Appeals' decision and *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968). In *Black Hills*, the Eighth Circuit upheld permanent must-carry rules purportedly designed to preserve local broadcasting.[5] 399 F.2d at 71-72. There can be no conflict between the *Black Hills* decision and the decision below because the two courts were analyzing different rules which the FCC sought to justify on the basis of differ-

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[4] These include, in particular, the development of cable television into a creator and distributor of its own programming and the continued development of UHF and educational broadcasting. Both developments have decreased any legitimate concern about the vitality of local programming, while cable's development as a programming source has elevated the First Amendment implications of must-carry rules. Furthermore, as the FCC found, must-carry rules impede other statutory goals including those set forth in the Cable Communications Policy Act, 47 U.S.C. § 521, enacted long after the decision in *Southwestern*. *See* P.A. at 233a.

[5] The Court's statement in *United States v. Midwest Video Corp.*, 406 U.S. 649, 659 n.17 (1972) (plurality) that *Black Hills* "correctly upheld" the must-carry rules was subsequently identified as *dicta* in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 n.7 (1979). In that same decision, the Court affirmed an Eighth Circuit decision in which the Court of Appeals itself undercut the precedential value of *Black Hills* by adopting reasoning inconsistent both with the earlier decision and with petitioners' current argument. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053-57 (8th Cir. 1978). *See* P.A. at 139a n.134.

ent interests. *See Century Communications*, P.A. at 16a-18a & n.4.

Indeed, even *Quincy* did not foreclose FCC reliance upon the preservation of local broadcasting as support for must-carry rules. 768 F.2d at 1459. *Quincy* held merely that the FCC must supply appropriate support for any such rationale. *Id.* The FCC's subsequent rejection of the interests of local broadcasting as support for must-carry rules was an administrative determination of the sort petitioners elsewhere fervently support.[6]

The rationale that the FCC relied on to justify the temporary must-carry rules—the maintenance of programming diversity while a consumer misperception is corrected—raises no issue warranting this Court's attention. As the Court of Appeals found, there is no evidence or sound reasoning suggesting that either the problem exists or the proposed cure is appropriate. P.A. at 28a. But more importantly here, the identified problem (a consumer misperception) and solution (temporary must-carry rules) have anything but "profound implications for the regulation of electronic communications." NAB Pet. at 11.

The problem is one the FCC itself identifies as temporary and which by the inherent logic of its reasoning will be exacerbated, not solved, by continuing must-carry rules. *See* P.A. at 110a-11a. If any misperception ex-

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[6] It is well-established that an agency can change its interpretation of how best to further the governmental interests with which it has been charged after carefully reviewing evidence that circumstances have changed, a recognition that it is changing course and an explanation of the reasons for the change. *E.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 417-18 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

ists, five more years of must-carry rules will simply reinforce such a misperception and delay the use of input-selector switches. P.A. at 27a. At the same time, must-carry rules stand likely to decrease consumers' viewing options by requiring cable operators to provide programming available off-air at the expense of programming available only via cable.

The solution is one which each petitioner takes pain to describe as modest. UCC Pet. at 20; CPB Pet. at 21-22; NAB Pet. at 29; INTV Pet. at 18. The temporary must-carry rules apply to only some cable operators, benefit only some broadcasters, and would exist for only five years. P.A. at 180a-82a, 184a. Moreover the Court of Appeals never ruled that these or any other must-carry rules are *per se* unconstitutional. P.A. at 28a. It ruled only that the FCC must offer evidence in their support. *Id.* Thus, neither the fact that these temporary regulations were struck down by the Court of Appeals nor the reasoning used to achieve that result raises a substantial issue warranting review.

II. No Substantial or Important Issue Concerning The Deference To Be Afforded Agency Discretion Is Presented.

Each petitioner's request for review depends, in large measure, upon an effort to portray the Court of Appeals as having "substituted its judgment for that of the FCC." CPB Pet. at 17. *See also* NAB Pet. at 22; INTV Pet. at 18-19. Central to this effort is the petitioners' assertion that the substantial deference normally due agency factual determinations should be afforded to the FCC's decision even though it affects First Amendment rights. CPB Pet. at 17-22; NAB Pet. at 21-26; INTV Pet. at 19-22. Thus, the petitioners argue, the Court of Appeals erred when it invalidated the must-carry rules because the FCC "merely posit[ed] the existence of the disease sought to be cured" without adducing believable

evidence on the record. P.A. at 26a (quoting *Quincy*, 768 F.2d at 1455). *See* CPB Pet. at 12-17; NAB Pet. at 26-29; INTV Pet. at 19-23.

To the extent the petitioners assert that governmental actions affecting First Amendment rights should be accorded the same deference as actions involving purely technical matters, they are wrong. "Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986). *Cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 77 (1981) (Blackmun, J. concurring) ("the presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment").

Moreover, even deference to a supposed agency expertise could not save the FCC's actions in this case. In the absence of empirical evidence to the contrary, common sense dictates that people are able to quickly grasp the proposition that an antenna is necessary to receive over-the-air signals not carried on cable. No case cited by the petitioners suggests that without empirical evidence or at least sound reasoning an agency may base regulations burdening free speech on a counter-intuitive model of human behavior.

The only case cited by petitioners dealing in more than passing language with the level of deference to be paid to a governmental evaluation of the interests served by a regulation or statute affecting free speech is *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[7]

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[7] The majority of the cases petitioners rely upon either raised no First Amendment issue at all, (*E.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (decision to build interstate highway); *Vermont Yankee Nuclear Power Corp. v. Natural Re-*

The *Renton* Court recognized that a city was entitled to rely on studies and the experience of other cities to establish the substantiality of its governmental interest. 475 U.S. at 50-52. It did not hint that a city could rely on unsupported predictions and conjecture, as the FCC did. *Id.*

The petitioners also argue that the Court of Appeals erred in rejecting the FCC's selection of five year must-carry rules as the most appropriate mechanism to serve the governmental interest asserted. CPB Pet. at 18-22; NAB Pet. at 21-29. However, the Court of Appeals was careful to make explicit that "we do not base our decision on any judgment as to the relative desirability of these alternative proposals." P.A. at 27a-28a n.6. Rather, it focused, as *O'Brien* required, on whether the new interim must-carry rules were narrowly tailored to achieve the goals identified by the agency. P.A. at 26a-28a. The Court of Appeals' decision was, therefore, wholly consistent with this court's holdings in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) and *United States v. Albertini*, 472 U.S. 675, 689 (1985), that courts are not to choose the most appropriate method for serving a substantial governmental interest.

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sources Defense Council, Inc., 435 U.S. 519 (1978) (licensing of nuclear reactors)) or did not involve a dispute over whether the governmental interest was substantial and threatened by the expressive activity regulated. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. Albertini*, 472 U.S. 675 (1985). The dispute in the latter cases was over the constitutionality of the *mechanisms* chosen to serve the governmental interest. For example, the *Clark* Court assumed without debate the existence of a substantial governmental interest in protecting national parks and examined the asserted justification for the mechanism relied upon by the government to serve that interest. 468 U.S. at 296, 299. The *Albertini* Court also assumed a governmental interest in maintaining the security of military installations and examined the governmental mechanism used to protect the military base at issue. 472 U.S. at 688-89.

Petitioners' final argument is that the Court of Appeals erred in its review of the administrative record. CPB Pet. at 12-14; NAB Pet. at 26-29. However, the responsibility for assessing a record to determine whether agency findings are supported by the evidence is "primarily" that of the Court of Appeals: "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951)).

Even a brief review of the record demonstrates that this case is far from the rare instance in which review is warranted. There was no evidence or plausible reasoning to suggest that cable subscribers will need five years—enough time for a sixteen year old to not only learn to drive but also to graduate from college—to learn that they must use a switch to turn to off-air reception and an antenna to receive broadcasts by local television stations not carried on their cable system.[8] Instead, as

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[8] CPB claims the Court of Appeals ignored another FCC justification for the five-year rules—that technical improvements were necessary for input-selector switches. CPB Pet. at 13-14. CPB cites for this proposition the FCC *Report and Order*, P.A. at 128a. The FCC essentially repudiated this point on reconsideration, when it held current switches to be adequate to the job with "relatively minor modifications." *See* P.A. at 236a. While the other petitioners claim switches will never work, this argument, of course, conflicts with their fervent support for FCC expertise elsewhere. UCC Pet. at 14 n.18; NAB Pet. 25-29; INTV Pet. at 24-25. In any event, at the time the FCC adopted its input-selector switch rules, it instituted a proceeding to establish technical standards for them and has now issued a Report and Order in that proceeding. None of the petitioners other than CPB participated in that proceeding, where issues about the technical performance of input-selector switches could have been raised, and they should not be heard to complain now about the technical capability of those switches. *See Report and Order*, Gen. Docket No. 87-107, 2 FCC Rcd 7231, 7238 (1987) (list of commenting parties).

the Court of Appeals pointed out, the FCC itself supplied evidence that such a five-year tutorial was not necessary because consumers were already becoming accustomed to switching between alternative program input sources. P.A. at 23a-24a.[9] Indeed, a five-year transition would only delay the "inevitable, but almost certainly brief" period during which cable subscribers were weaned from reliance on must-carry rules.[10] P.A. at 27a.

The Court of Appeals was also correct in refusing to credit the FCC's assumption that, in the absence of must-carry rules, cable companies would cease carriage of significant numbers of local broadcast stations—despite the fact that cable operators had not done so in the 16-month period between the *Quincy* decision and the time the temporary must-carry rules became effective.[11] P.A.

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[9] Although not mentioned by the Court of Appeals, Mr. Leghorn pointed out in his pleadings that the FCC's rationale also contradicted explicit findings in other proceedings by the FCC, based on "considerable evidence," that viewers already take "significant measures," such as improved antennas, to receive desirable television signals if they do not receive them via cable service. *Report and Order* in MM Docket No. 84-1296, 58 Rad. Reg.2d (P&F) 1, 28 (1985), *remanded on other grounds sub nom., American Civil Liberation Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied sub nom., Connecticut v. FCC*, 56 U.S.L.W. 3644 (1988).

[10] Petitioners continue to argue that cable television systems are "gatekeepers" that block access to off-air television reception. *See* CPB Pet. at 22-23; NAB Pet. at 12. The FCC explicitly rejected this notion. It held that the "gatekeeper" sobriquet was the result of the FCC's prior must-carry rules, which gave cable subscribers no reason even to attempt to receive off-air local television broadcast signals. P.A. at 99a. The root purpose of the FCC's input-selector switch rules is to ensure the continued availability to cable subscribers of off-air broadcast signals that are not carried by cable systems. P.A. at 109a-10a.

[11] Some petitioners argue that a significant number of broadcast signals were deleted by cable systems when must-carry rules were first held unconstitutional. UCC cites press reports that 196 noncommercial stations were dropped. UCC Pet. at 16-17 n.21. INTV cites an earlier CPB pleading to claim 185 cases of public stations

at 25a. The FCC itself appears uncertain of its own data on this point because, without waiting for the results of petitions before this Court, it has already commenced yet another proceeding to obtain evidence whether broadcast signals have been dropped by cable systems and what harm might arise from such a result. *Notice of Inquiry*, MM Docket No. 88-138, adopted March 24, 1988 (FCC Rep. No. DC-1134).[12]

In short, by any standard except blind deference to administrative determinations, the FCC simply failed to justify under the *O'Brien* standard any rationale for its temporary must-carry rule. Thus, the Court of Appeals' treatment of the *O'Brien* standard violates no constitutional principles and raises no important or substantial issue this Court should review.

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being deleted. INTV Pet. at 17 n.32. Neither CPB in its brief nor the FCC in its decisions relied on these figures. In the proceedings below, the National Cable Television Association ("NCTA") analyzed the alleged instances of noncommercial stations being deleted and pointed out that the numbers were unreliable. These numbers counted many stations that *never had* been carried, *were not entitled* to carriage under the old rules or had even *requested* deletion. Reply of NCTA in MM Docket No. 85-349, March 2, 1987 at 6, n.5 and Attachment B (Court of Appeals J.A. at 618, 625-29).

[12] The fact that the FCC is currently in the process of seeking to gather the evidence it lacked in this proceeding and has not yet received, much less evaluated comments in that proceeding, is alone a sufficient reason for denying the petitions now before this Court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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